MOHD AZAM MOHD YASIN A

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR B
SU GEOK YIAM J
[CRIMINAL APPEAL NO: 42-150-2009]
8 NOVEMBER 2011

CRIMINAL LAW: *Corruption - Corruptly receiving gratification - Whether trial judge applied correct burden on defence - Whether trial judge erred in requiring appellant to prove innocence - Whether trial judge erred in admitting taped recording of phone conversation and transcript - Whether voices in tape recording identified - Whether appellant's explanation consistent with innocence - Whether appellant raised doubt over prosecution case - Whether conviction and sentence safe - Anti-Corruption Act 1997, s. 11(a)* C D

CRIMINAL PROCEDURE: *Appeal - Conviction, against - Offences of corruptly asking and receiving gratification - Whether trial judge applied correct burden on defence - Whether trial judge erred in requiring appellant to prove innocence - Whether trial judge erred in admitting taped recording of phone conversation and transcript - Whether voices in tape recording identified - Whether appellant's explanation consistent with innocence - Whether appellant raised doubt over prosecution case - Whether conviction and sentence safe - Anti-Corruption Act 1997, s. 11(a)* E F

EVIDENCE: *Burden of proof - Evidential burden of proof on prosecution - Whether sufficient for accused to cast doubt on prosecution case - Whether burden on accused to prove innocence* G

This was an appeal by the appellant against the decision of the learned Sessions Court judge in convicting and sentencing him for an offence under s. 11(a) of the Anti-Corruption Act 1997 ('the Act'). The complainant ('PW1') had been operating an H unlicensed rojak and cendol stall in Bangsar. The appellant and PW5 (Dewan Bandaraya Kuala Lumpur employees) had on two previous occasions issued summonses to PW1 for hawking without a license. On 31 December 2004, PW5 and the appellant seized PW1's lorry and purported to summon PW1 for hawking without I a license and for confiscation of his lorry. PW1 claimed that PW5

had asked him to pay to PW5 a monthly sum of RM600 in order to settle the matter. PW1 lodged a report with the Anti-Corruption Agency ('the ACA'). As instructed by the ACA officers, PW1 made an appointment to meet the appellant at a bus stop. PW1 was given RM300 cash in marked notes by an ACA officer. At the bus stop, PW1 and his worker (PW4) met the appellant and PW1 handed over the marked notes to the appellant. Upon PW1 giving the pre-arranged signal, the ACA officers who were waiting in ambush arrested the appellant. The appellant's superior officer (PW3) testified that the appellant and PW5 were authorised to carry out enforcement against unlicensed hawking activities. The ACA officers who were at the meeting place testified that they did not see PW1 handing over the marked notes to the appellant. The conversation between PW1 and the appellant at the meeting place was not heard or recorded by any of the ACA officers. The appellant in his defence denied asking the complainant to pay him a sum of RM600 as alleged. The appellant claimed that he had met PW1 at the bus stop and PW1 asked him for his assistance to settle the matter with PW5 relating to the notice of confiscation which would be followed by the notice of compound. According to the appellant, PW1 did not want to meet PW5 as he was afraid of PW5. While they were shaking hands, PW1 took out his left hand from his sling bag and placed it inside the appellant's shirt pocket. The appellant said that PW1 then left in a hurried manner after which the ACA officers arrested him.

Held (allowing the appeal):

(1) The learned trial judge had applied the wrong burden on the defence. The statutory duty of the trial judge at the conclusion of the trial is clearly set out in s. 173(m)(i), (ii), and (iii) of the Criminal Procedure Code ('the CPC'). These provisions expressly mandate that the accused can only be found guilty if the courts find that the prosecution has proved its case against the accused beyond reasonable doubt. It is sufficient for the accused in his defence to cast a doubt on the prosecution case to entitle him to an acquittal at the conclusion of the trial. He can discharge that burden by giving an explanation which is consistent with his innocence. He has no burden to prove his innocence. He has no burden to cast a doubt on a balance of probabilities. (paras 83-85 & 101)

(2) The learned trial judge erred when he admitted the taped recording of the alleged phone conversation between PW1 and the appellant and the transcript of it. The reason is that the alleged voices of PW1 and the appellant were not identified by PW1 before the trial judge and the defence was not given an opportunity to cross-examine PW1 on the accuracy, authenticity and veracity of the contents of the taped recording and the purported meaning of the words assigned to them by the prosecution. (para 103)

(3) The trial judge also seriously misdirected himself when he required the appellant to prove his innocence by raising a reasonable doubt based on a balance of probabilities which militates against the elementary principles of criminal jurisprudence. (para 104)

(4) PW1 admitted that the RM300 which he had handed over to the appellant was for the appellant to hand over to PW5. Hence, the appellant's explanation that he merely wished to help PW1 by handing over the RM300 to PW5 in order to settle on behalf of PW1 the notice of confiscation/compound which PW5 was going to issue to PW1, and that the appellant did not solicit from PW1 a monthly bribe of RM600 or a one-off bribe of RM300 might reasonably be true. It was consistent with the appellant's innocence since the appellant had in fact issued two summonses to PW1. The appellant was detained and arrested by the ACA officers before he could hand over the RM300 to PW5. Further, PW5 testified that the maximum amount of the compound for the offence was that amount. (para 105)

(5) The appellant succeeded in raising a doubt in the prosecution case. The prosecution failed to discharge its burden of proving its case against the appellant beyond reasonable doubt. Thus, it was unsafe for the conviction and sentence to remain. (paras 105 & 106)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chor Shuh v. PP [2003] 1 CLJ 501 CA ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Hiew Min Yong v. PP [2000] 1 LNS 102 HC ***(refd)***
Lim Kheak Teong v. PP [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207 FC ***(refd)***

Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mahadi v. PP [1969] 1 LNS 103 HC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Murugiah v. PP [1940] 1 LNS 59 HC ***(refd)***
Osman Khan v. PP [1948] MLJ 56 ***(refd)***
Periasamy Sinnappan v. PP [1996] 3 CLJ 187 CA ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
Rajoo v. Rex [1949] 1 LNS 70 HC ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 3(1), 11(a), 16, 42(1)
Criminal Procedure Code, s. 173(m)(i), (ii), (iii), 182A(1)
Penal Code, ss. 109, 409
Prevention of Corruption Act 1961, s. 4(c)

For the appellant - Mohd Yaacob; M/s Lainah Yaacob & Zulkepli
For the respondent - Roziza Sidek (Azmer Saad with her); DPP

Reported by Amutha Suppayah

JUDGMENT

Su Geok Yiam J:

Background

[1] This is an appeal by the appellant against the decision of the learned Sessions Court Judge (the "learned trial judge") dated 3 December 2009 in convicting him for an offence under s. 11(a) of the Anti-Corruption Act 1997 (the "Act") and in sentencing him to the minimum imprisonment term of 14 days and a fine of RM10,000 in default three months imprisonment under s. 16 of the Act (the "said sentence").

The Charge

[2] The charge against the appellant in the Sessions Court states as follows in the Malay language:

> Bahawa kamu pada 06.01.2005 pada jam lebih kurang 3.30 petang di perhentian bas di hadapan Bangunan PKNS, Jalan Raja Laut di dalam Wilayah Persekutuan, Kuala Lumpur, sebagai seorang ejen Kerajaan Malaysia iaitu Pembantu Tadbir N17, Jabatan Pengurusan Penjaja, Dewan Bandaraya Kuala Lumpur, telah secara rasuah

menyetujui-terima untuk diri kamu sendiri satu suapan, iaitu wang tunai sebanyak RM300 [Ringgit Malaysia Tiga Ratus Sahaja] daripada seorang yang bernama Abdul Malik Bin Thajudeen sebagai satu dorongan untuk tidak melakukan sesuatu perbuatan berhubung dengan hal ehwal principal kamu iaitu, supaya tidak mengambil tindakan mengeluarkan saman keatas beliau yang berniaga di Jalan Penaga, Taman Bukit Bandaraya, Kuala Lumpur tanpa lesen dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 11 (a) Akta Pencegahan Rasuah 1997 yang boleh dihukum di bawah Seksyen 16 Akta yang sama.

The Prosecution Case

[3] The prosecution called 17 witnesses in order to establish a *prima facie* case against the appellant as per the charge.

[4] The case for the prosecution is, briefly, as follows.

[5] The complainant (PW1) had been operating his unlicensed rojak and cendol stall in Bukit Bandaraya, Bangsar, in the Federal Territory of Kuala Lumpur, since the year 2002.

[6] On one occasion, as the complainant was hawking his rojak and cendol at his unlicensed stall in Bukit Bandaraya along came the appellant and PW5 and the appellant issued a summons to the complainant for hawking without a license. A couple of weeks later the complainant was again issued a summons by the appellant for committing the same offence.

[7] Subsequently, on 31 December 2004, while the complainant's worker (PW4), was getting the complainant's unlicensed rojak and cendol stall ready for business, the complainant received a phone call from PW4 that PW5 and the appellant were at his stall. The complainant rushed to his stall. When he arrived at his stall the appellant told the complainant not to open his stall for business.

[8] PW5 then seized the complainant's lorry and took it back to the Kuala Lumpur City Hall (the "KLCH"). The appellant told the complainant that PW5 would be issuing to the complainant two notices, ie, one to compound the offence of hawking without a license and another for the confiscation of his lorry. The complainant gave his mobile phone no. to the appellant upon the latter's request.

[9] Subsequently, the appellant called him on his mobile phone and informed him that PW5 wanted to speak to him. He called PW5. PW5 asked him to see PW5 at PW5's office.

[10] Instead he called and spoke to PW5 on the phone. PW5 told him that PW5 was preparing a notice to confiscate the complainant's lorry. PW5 asked the complainant to see PW5 at PW5's office at level 5 of the KLCH. On that occasion PW5 did not ask him for money. He told PW5 he was busy that day and that he would only be able to see PW5 at the KLCH on the following day.

[11] Subsequently, PW5 called him on his mobile phone. PW5 asked him to pay to PW5 a monthly sum of RM600 in order to settle the matter and to enable the complainant to operate his stall although he did not have a license from KLCH. Thereafter he could continue to operate his unlicensed stall without being harassed by the other enforcement officers of the KLCH.

[12] He discussed PW5's proposal and request for the monthly sum of RM600 with his worker (PW4). He then decided to lodge a report (P4) with the Anti-Corruption Agency (the "ACA").

[13] In P4 which he lodged on 6 January 2005, he alleged that PW5 and the appellant had gone to his rojak and cendol stall in Bukit Bandaraya, Bangsar, sometime in November 2004 to issue a summons to him for operating his stall without a license. The appellant had also asked him to go to his office to discuss the matter.

[14] In P4 he also alleged that during the discussion at the appellant's office the appellant had asked him to pay a monthly sum of RM600 in order to prevent his stall from being harassed, presumably, by the appellant. He further alleged in P4 that on 5 January 2005, at about 2.30pm, the appellant contacted him and asked him to go to his office in the afternoon of the following day, 6 January 2005, with the sum of RM600.

[15] After he had lodged P4, he was instructed by the ACA officer to call and speak to the appellant on the phone. He did as he was instructed. His phone conversation with the appellant was recorded by an ACA officer. He asked the appellant where he was to meet up with the appellant and how much money he should bring along with him to see the appellant.

[16] The appellant said the word "tiga" in the Malay language which means "three" in the English language. The complainant took it to mean that the appellant wanted him to bring along with him RM300. The appellant then asked him to meet up with the appellant at the bus stop which was near to the KL (the "meeting place").

[17] He informed the ACA officer of the appellant's request. He was then given RM300 cash in marked notes (P5) by an ACA officer. He placed the marked notes in his sling bag.

[18] He was also briefed by the ACA officer on the pre-arranged signal which he had to give after he had handed over the marked notes to the appellant.

[19] He then proceeded to the meeting place on a motorcycle together with his worker (PW4). At the meeting place both of them then sat on a bench and waited for the appellant. When the appellant arrived he took out the marked notes from his sling bag with his right hand. As he touched the appellant's hand with his right hand he also passed the marked notes to the appellant using the same hand. The appellant then asked him to go with the appellant to meet PW5 in PW5's office. But he told the appellant he was in a hurry.

[20] He then left the meeting place. As he walked away he gave the pre-arranged signal to the ACA officers who were waiting in ambush to detain and arrest the appellant.

[21] He and his worker (PW4) then got onto his motorcycle and they left the meeting place. They then proceeded to the office of the ACA.

[22] PW4 testified that upon the arrival of the appellant at the meeting place the only discussion which took place between the appellant and the complainant at the meeting place was the appellant's request for the complainant to go with the appellant to see PW5 at the KLCH in order to settle the compound with respect to the detention and confiscation of the complainant's lorry.

[23] But the complainant and PW4 did not agree to the appellant's request because they had been instructed by the ACA officer during the briefing at the office of the ACA to hand over

A the marked notes to the appellant at the meeting place. The excuse which they gave to the appellant for not agreeing to his request was that they had another matter to attend to.

[24] He then saw the complainant handing over the marked
B notes to the appellant. He and the complainant then hurriedly left the meeting place.

[25] PW4 also testified that it was the complainant who had informed PW4 that the appellant had asked for money from him. He did not hear the appellant asking the complainant to pay
C money to the appellant.

[26] PW4 also testified that the complainant had never applied for a license from the KLCH to operate his rojak and cendol stall.

D **[27]** PW4 also testified that the appellant had issued summonses to the complainant for hawking without a license.

[28] Encik Azlan bin Abdullah (PW3) the superior officer of the appellant identified two summonses as the summonses which had been issued by the appellant. He also identified the appellant and
E PW5 as enforcement officers who were directly under his direction and supervision. As enforcement officers they had the authority to seize property belonging to the offenders and to issue summonses against them.

F **[29]** He further testified that both of them were authorised to carry out enforcement against unlicensed hawking activities. He confirmed that he had received some complaints concerning unlicensed hawking activities in the Bangsar area and that he had directed the appellant to act upon the complaints.

G

[30] None of the ACA officers who were at the meeting place and who were called as witnesses by the prosecution testified that they saw the complainant handing over the marked notes to the appellant. All of them said they did not see the complainant
H handing over the marked notes to the appellant. However, they did say that they saw the appellant speaking to the complainant at the meeting place but they were out of earshot.

[31] The conversation between the complainant and the
I appellant at the meeting place was not recorded by any of the ACA officers.

[32] PW8 was the ACA officer who detained and arrested the appellant at the meeting place upon seeing the pre-arranged signal which was given by the complainant. He said he did not see the handing over of the marked notes by the complainant to the appellant.

[33] PW5 testified that in the year 2000 he was attached to the Complaints and Enforcement Division in the Department of Hawkers and Small Businesses in the KLCH as an Administrative Officer on the operations side.

[34] His duties involved enforcement of the by-laws of the KLCH relating to hawking, in particular, the conduct of operations and the taking of action against persons who were hawking without licenses issued by the KLCH.

[35] His superior officer was one Encik Azlan (PW3). There were three enforcement teams under Encik Azlan (PW3). Each team had a head, two men and a driver.

[36] He headed one of the three teams. He had two men under him and a driver. The appellant headed one of the other two teams. The 3rd team was headed by one Encik Halim.

[37] He remembered that in December 2005, the van which was assigned to the appellant had broken down. So the appellant asked him to give the appellant a lift to Bukit Bandaraya to enable the appellant to investigate a complaint from the public concerning some foreigners who were hawking without a license from KLCH.

[38] Upon his arrival at the location concerned he saw some foreigners who were hawking rojak and cendol from the back of a pick-up on the road shoulder without a license from KLCH. He saw the appellant speaking to the hawker concerned and also writing out something in the appellant's summons book.

[39] He and his men also assisted the appellant by seizing a canopy which was blocking the road. He, the appellant and their men then returned to their office at the KLCH.

[40] Subsequently, on 5 January 2005, at about 2.30pm, while he was in his office, the appellant approached him and handed over to him his mobile phone. He asked the appellant what was the matter. The appellant asked him to speak to the person on the phone.

[41] He answered the phone and he heard the voice of a person asking for his help concerning the person's rojak stall in Bukit Bandaraya. He did not know the person. He asked the person what was his problem.

[42] The person told him about his rojak stall in Bukit Bandaraya. He asked the person to see his superior officer at the KLCH in order to make an appeal for the extension of the period specified in the notice of confiscation. He also advised the caller to apply for a license at the KLCH.

[43] He did not mention anything to the caller about money or the payment of money. He also did not instruct the appellant to request for any money from the caller and to share out the money between them.

[44] On 6 January 2006, at about 3.30pm, while he was preparing a report on his work in his office at the KLCH, three civilians approached him and told him that they were looking for a person by the name of Mustaffa bin Md Said. He said he was the person. They introduced themselves to him as ACA officers. They then took him to the ACA office. At that time he did not know the reason why they were taking him to the ACA office.

[45] When he was cross-examined by the appellant's learned counsel, he denied that he had asked the caller to see him in his office at the KLCH in order to pay to him a sum of RM300 as the amount of the compound for the summons which had been issued by the appellant to the complainant for hawking without a license.

[46] He explained that he had no authority to determine the amount of the compound payable by the caller and that it would be determined by another officer. He denied that the appellant had told him that the complainant wished to see him in his office at the KLCH in order to settle the compound for the offence which the complainant had committed under s. 3(1) of the relevant law.

[47] This court noted that in the transcript (P14) of the alleged taped recorded conversation between the complainant and the appellant there is no reference whatsoever to the conversation

between the complainant and PW5 and the conversation between the complainant and the appellant concerning the request by PW5 and the appellant for a monthly sum of RM600 being payment by the complainant to PW5 and the appellant in order to prevent the complainant from being harassed by PW5 and the appellant as alleged in the complainant's report (P4).

[48] What was recorded was the request by the complainant to settle the summons which was issued to the complainant the day before the phone call was made by the complainant to the appellant. The complainant asked how much money he ought to bring and he was told by the appellant that it was entirely left to him but that the appellant would assist him to settle the matter with PW5.

[49] The appellant asked the complainant to bring along RM300 with him. If the latter did not have the money to pay for the summons on behalf of his uncle, the appellant said he was willing to pay PW5 with his own money first in order to settle the amount for the summons. When the complainant asked the appellant whether he had to make the payment on a monthly basis, the appellant said that it was not necessary for the complainant to pay any monthly amount.

Decision Of The Learned Trial Judge At The Close Of The Prosecution Case

[50] At the close of the prosecution case, the learned trial judge was satisfied that the prosecution had succeeded in proving a *prima facie* case against the appellant as per the charge.

[51] He found that at the material time, the appellant was an Assistant Administrative Officer who was attached to the department for the Management of Hawkers in the KLCH. He also found that the appellant had corruptly accepted a RM300 cash gratification, in his capacity as an agent of the Government of Malaysia, from the complainant, namely, Abdul Malik bin Thajudeen, as an inducement not to issue a summons to the complainant for the offence of hawking without a licence along Jalan Penaga, Taman Bukit Bandaraya, Kuala Lumpur.

[52] He, consequently, ordered the appellant to make his defence to the charge.

A **Appellant's defence**

[53] The appellant elected to make his defence by giving evidence on oath as DWI. He did not call any other witness.

B **[54]** In his defence the appellant said as follows in his examination-in-chief:

(1) He commenced his service at the KLCH on 26 October 1972;

C (2) In the year 2004 he was attached to the Department of Hawkers at the KLCH;

(3) His duties included investigating complaints from the public, enforcing the by-laws relating to licensing, putting up reports concerning his investigations into the complaints from the
D public against unlicensed hawkers at locations mentioned in the complaints after he had carried out his inspections at the locations concerned and confiscating paraphernalia used in unlicensed hawking activities upon being directed by Encik
E Azlan, his superior officer;

(4) On 30 April 2004 he and PW5 were directed by Encik Azlan (PW3) to take stern action, including the confiscation of property belonging to unlicensed hawkers, against unlicensed hawkers at Jalan Penaga, Bukit Bandaraya, in the Bangsar
F area and he had issued out summonses to them including a summons (P1) which was issued to one of them, namely, the complainant and another summons (P2) which was issued to a van which was used by the complainant in his hawking business but registered in the name of Katering Cahaya Suria
G (Ascervatham);

(5) He showed the location to PW5 and upon their arrival at the location he remained inside the van;

H (6) He saw through the glass window of the van, PW5 and his two men confiscating some items belonging to the complainant who was hawking there through his foreign worker without a license;

(7) When PW5 placed the confiscated items inside the van, he
I asked PW5 whether PW5 had issued a notice of confiscation to the complainant but PW5 said he had not;

(8) The appellant then told PW5 that PW5 had to issue to the complainant the notice as was directed by Encik Azlan (PW3);

(9) PW5 was not happy with the appellant for insisting that he had to issue the notice of confiscation to the complainant;

(10) On 31 December 2004, the complainant showed to the appellant a license which was issued in the complainant's father's name;

(11) He advised the complainant to change the name of the licensee from his father's name into his name;

(12) Subsequently, PW5 asked the appellant to contact the complainant to meet him in his office in order to collect the notice of confiscation and to pay the compound;

(13) The appellant called the complainant and he overheard PW5 telling the complainant to go to his office to collect the notice of confiscation and to pay the amount of the compound for the offence which he had committed which was usually set at RM300;

(14) He did not hear PW5 asking the complainant to pay RM600;

(15) He himself did not ask the complainant to pay him a sum of RM600 as alleged by the complainant;

(16) On 6 January 2005, the complainant called him and told him he needed the appellant's assistance to settle a notice of compound;

(17) On the day that he testified in his defence to the charge the complainant had yet to settle the compound in respect of the two summonses which were issued by him;

(18) He did not at any point in time ask the complainant to pay money to him monthly;

(19) The amount of RM300 which was brought by the complainant was sufficient to pay the notice of confiscation or the notice of compound;

(20) In the event it was insufficient he would use his own money to settle the matter as he knew the complainant's father and the complainant could pay him back later;

(21) As a Muslim, ie, a person who is a follower of the religion known as Islam, he felt that it was his duty to help the complainant because he would be rewarded for it either in this world or in the next world;

(22) He also knew the complainant's father and he had previously eaten rojak at the stall of the complainant's father as he had a preference for rojak;

(23) He had met the complainant at the bus stop in front of the Wisma PKNS building along Jalan Raja Laut and the complainant had asked him for his assistance in order to settle the matter with PW5 relating to the notice of confiscation which would be followed by the notice of compound;

(24) He had asked the complainant to go together with him to the office of PW5 on level 5 of the KLCH but the complainant declined to accompany the appellant to meet PW5 as the complainant was afraid of PW5;

(25) Nevertheless, complainant continued to plead with him to assist him;

(26) The complainant then shook the appellant's hand with his right hand and as he did that he took out his left hand from his sling bag and placed it inside the appellant's left shirt pocket and at the same time he pleaded with the appellant to help him;

(27) The complainant then left the appellant in a hurried manner;

(28) He then walked towards PW5's office but upon reaching the stairs leading to the PKNS building he was detained and surrounded by several persons whom he did not know;

(29) They introduced themselves to him as ACA officers;

(30) He was shocked as he did not expect that because of his sincerity in wanting to assist the complainant to settle the seizure of his property by PW5 the latter had set a trap for him with the assistance of the ACA; and

(31) He was due to retire on 31 March 2006.

[55] When he was cross-examined by the learned Deputy Public Prosecutor, his evidence remained unshaken. He denied that the RM300 was not meant to pay the compound but was meant to be paid to him for his benefit and that he had phoned the complainant to bring along the money in order to pay it to him.

[56] He also denied that he had phoned the complainant to ask the complainant to pay him a monthly sum of RM600 in order that he would not harass the complainant in his unlicensed hawking business.

[57] He also denied that he did not know the complainant's father.

[58] He also denied that there was no instruction from Encik Azlan to issue the notice of confiscation to the complainant.

[59] When he was re-examined by his learned counsel, his testimony was consistent with his testimony which was given by him in his examination-in-chief and cross-examination.

Decision Of The Learned Trial Judge At The Close Of The Defence Case

[60] At the close of the case for the defence the learned trial judge did not believe the sworn oral testimony of the appellant.

[61] He was satisfied that the defence of the appellant was a bare denial and that it did not rebut the statutory presumption in s. 42(1) of the Act that the appellant had accepted from the complainant a corrupt gratification, ie, the RM300 cash in marked notes which was recovered from the pocket of the appellant's shirt, as an inducement not to issue a summons to the complainant. The ground for the conclusion of the learned trial judge was that the defence of the appellant was not supported by other evidence.

[62] He was, therefore, satisfied that the defence had failed to raise a reasonable doubt in the prosecution case.

[63] After subjecting the totality of the evidence of the prosecution and defence to a maximum evaluation he held that the prosecution had succeeded in proving the case against the appellant beyond reasonable doubt. He cited the cases of *DA Duncan v. PP* [1980] 1 LNS 12 and *PP v. Saimin & Ors* [1971] 1 LNS 115 in support of his decision.

[64] He, consequently, found the appellant guilty as charged. He, accordingly, convicted the appellant for the offence as stated in the charge.

[65] After hearing the appellant's plea in mitigation of sentence he imposed the said sentence on the appellant.

[66] Being dissatisfied with the decision of the learned trial judge the appellant filed a notice of appeal to the High Court.

Appellant's Grounds Of Appeal

[67] In his petition of appeal the appellant has relied on 11 grounds to challenge the decision of the learned trial judge.

[68] The 11 grounds are as follows:

(1) The learned trial judge erred when he held that the prosecution had succeeded in proving all the ingredients of the offence as specified in the charge against the appellant beyond all reasonable doubt;

(2) The learned trial judge erred when he held that the appellant had failed to rebut the statutory presumption in s. 42(1) of the Act;

(3) The learned trial judge erred when he found that the appellant had telephoned the complainant to settle the matter and had solicited from the appellant a monthly sum of RM600 in order that the complainant could carry on his unlicensed hawking activities along Jalan Penaga, Bukit Bandaraya undisturbed by the appellant;

(4) The learned trial judge erred when he failed to appreciate that there was no mention by the appellant of any gratification for him in the telephone conversation between the complainant and the appellant which was recorded on tape by the ACA officer;

(5) The learned trial judge erred when he admitted the transcript of the telephone conversation between the complainant and the appellant which was recorded on tape by the Anti-Corruption Agency ("ACA") officer as it was hearsay evidence;

(6) In holding that the appellant had accepted the cash of RM300 as an inducement not to issue a summons to the complainant for hawking without a license the learned trial judge erred when he failed to appreciate that the appellant had on two previous occasions issued two summonses to the complainant for hawking without a license;

(7) The learned trial judge erred when he found that the contents of the taped recorded telephone conversation show that the amount of RM600 which was initially solicited by the appellant was reduced to RM300 when a perusal of the transcript of the taped recording of the telephone conversation did not disclose that information;

(8) The learned trial judge erred when he held that there was evidence that the complainant had pleaded with the appellant not to issue a summons to him and that the appellant had agreed to help the complainant provided the complainant was able to pay him a monthly sum of RM600;

(9) The learned trial judge erred when did not draw an adverse inference against the prosecution for its failure to call as witnesses the driver of the KLCH van and the driver of PW5's van both of whom were present when the appellant and PW5 came upon the complainant hawking without a license along Jalan Penaga;

(10) The learned trial judge erred when he failed to appreciate that there were contradictions in the oral testimonies of the complainant and PW5; and

(11) The learned trial judge erred when he failed to appreciate that the appellant had offered to lend monies to the complainant in order to enable him to settle the notice to compound which PW5 was going to issue to the complainant, that the appellant had invited the complainant to go to Level 5 in the KLCH to meet up with PW5, that at the material time when the complainant placed the

A RM300 cash inside the pocket of the appellant's shirt the appellant was wearing his full uniform and they were in a public place in the presence of many members of the public and that the appellant was not aware that the complainant had set a trap for the appellant.

B

The Appellant's Submissions

[69] On 19 September 2011, this court heard the submissions of both the parties.

C **[70]** Encik Mohd Yaacob, learned counsel for the appellant, submitted that the appellant's appeal had merits. He submitted that there were many contradictions in the sworn oral testimony of the complainant.

D **[71]** He also submitted that the tape containing the recording of the alleged phone conversation (P12) between the complainant and the appellant and the transcript (P14) of the taped recording of the alleged phone conversation could not corroborate the sworn oral testimony of the complainant as they were only E tendered by the prosecution after the complainant had completed giving his evidence. Hence there was no opportunity for the complainant to identify the owners of the voices in the taped recorded telephone conversation as his and the appellant's voices to the learned trial judge.

F **[72]** Over and above those defects in the prosecution case his request to recall the complainant for further cross-examination on the contents of the alleged taped recorded phone conversation was erroneously rejected by the learned trial judge.

G **[73]** Apart from that the learned trial judge had failed to consider whether the explanation of the appellant that he knew the complainant's father and that his intention in accepting the cash of RM300 from the complainant was merely to help the complainant to settle a notice to compound which was going to H be issued by his PW5 might reasonably be true as the appellant had testified to that effect.

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[74] The learned trial judge had also erred in not ruling that it was desirable for the evidence of a trap witness to be corroborated by other evidence, ie, independent evidence on material particulars which implicated the appellant in the commission of the offence with which the appellant was charged.

[75] It was also the duty of the prosecution to prove beyond reasonable doubt that the RM300 was being paid to the appellant by the complainant as a bribe to the appellant to refrain from doing any thing which was within his lawful duty to do, ie, not to issue a summons to the complainant but the evidence of the prosecution clearly showed that the appellant had in fact issued two summonses against the complainant for hawking without a license from the KLCH.

Respondent's Submissions

[76] The learned Deputy Public Prosecutor submitted that even if this court were to rule that the taped recording and the transcript were inadmissible, the evidence of the complainant was sufficient to prove that the appellant had solicited a monthly sum of RM600 from the complainant and had received and accepted the cash of RM300 from the complainant as a bribe in order that the appellant would not harass the complainant in his unlicensed hawking activities.

Appellant's Submissions-in-reply

[77] Learned defence counsel submitted as follows in his reply.

[78] The defence had succeeded in raising a doubt in the prosecution case because the complainant had agreed with his suggestion which was put to him in cross-examination that the cash of RM300 was intended to be paid to PW5, not the appellant, as the seizure of his property was done by PW5, not the appellant.

Decision Of This Court

[79] This court agreed with the submissions of the appellant's learned counsel and accepted them. This court was satisfied that the appellant's appeal had merits because the learned trial judge had made serious errors in his grounds of judgment.

[80] This court, therefore, allowed the appellant's appeal. This court, accordingly, quashed the appellant's conviction, set aside the said sentence and ordered that the appellant be acquitted and discharged (the "said decision").

[81] Being dissatisfied with the said decision the Public Prosecutor has filed a notice of appeal to the Court of Appeal.

Reasons For Said Decision

[82] Below are the reasons for the said decision.

[83] Firstly, this court was of the view that the learned trial judge had applied the wrong burden on the defence.

[84] The statutory duty of the Magistrates and Sessions Courts at the conclusion of the trial is clearly set out in s. 173(m)(i), (ii), and (iii) of the Criminal Procedure Code (the "CPC"). These provisions in the CPC require them to determine at the conclusion of the trial whether the prosecution has proved its case against the accused beyond reasonable doubt.

[85] The provisions expressly mandate that the accused can only be found guilty if the courts find that the prosecution has proved its case against the accused beyond reasonable doubt. If the courts find that the prosecution has not proved its case against the accused beyond reasonable doubt, the courts shall record an order of acquittal against him.

[86] The provision states as follows:

> 173 Procedure in summary trial
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> …
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> (m) (i) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
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> (ii) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it and the Court shall sentence him according to law.

(iii) If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal.

[87] The wording of s. 173(m)(i), (ii) and (iii) of the CPC is in *pari materia* with the wording of s. 182A of the CPC which sets out the procedure to be followed by the High Court at the conclusion of the trial except for the words "and the court shall sentence him according to law" in s. 173(m)(ii) which are absent in s. 182A of the CPC. This difference in wording is not relevant here.

[88] In the case of *Balachandran v. PP* [2005] 1 CLJ 85 Augustine Paul JCA (as His Lordship then was) held that proof beyond reasonable doubt involves two aspects. One aspect is the legal burden on the prosecution to prove its case beyond reasonable doubt. The other aspect is the evidential burden on the accused to raise a reasonable doubt in the prosecution case. He held that where the accused has given evidence in his defence both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case.

[89] At p. 99 His Lordship said as follows:

> Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms.

[90] At pp. 100-101 His Lordship said as follows:

> Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s. 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence.

[91] Therefore, His Lordship held that a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s. 182A(1) of the CPC.

[92] In an earlier case *Hiew Min Yong v. PP* [2000] 1 LNS 102; [2001] 5 MLJ 1, which was decided by the same learned judge, His Lordship said as follows at p. 4:

> As Dixon J said in *Briginshaw v. Briginshaw* [1938] 60 CLR 336 at p. 361:
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> > The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence of existence before it can be found.
> >
> > This requires a positive finding on the credibility of witnesses and, consequently, the acceptance of their evidence. It is only then that a finding can be made on whether the prosecution has discharged its burden of proving the case beyond reasonable doubt. As Hashim Yeop Sani SCJ (as he then was) said in *Nagappan Kuppusamy v. PP* [1988] 2 MLJ 53 at p. 54:
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> > > In a criminal proceeding, the onus on the prosecution throughout is to prove beyond reasonable doubt. From the beginning to the end, the burden remains on the prosecution to prove the guilt of the accused. At the close of the whole case, the court has to consider all the evidence adduced by both the prosecution and the defence and has to be satisfied that the case has been proved beyond reasonable doubt.
> > >
> > > In other words, at the close of the whole case, the court has to consider all the evidence before it whether they satisfy all the ingredients of the offence. If upon the whole evidence the court is left in a real state of doubt, the prosecution is said to have failed to satisfy the onus of proof which lies upon it.

[93] At p. 5, His Lordship said as follows:

> It is settled law that the burden on an accused is only to raise a reasonable doubt and not, as stated by the learned sessions court judge, a reasonable doubt on balance of probabilities. This has the effect of elevating the evidential burden on the accused to a legal

> burden. In *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311, the (then) Supreme Court observed that proof on a balance of probabilities '… is heavier than the burden of casting a reasonable doubt …' though it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. The heavier burden placed by the learned sessions court judge on the accused is a serious misdirection in law and militates against the elementary principles of criminal jurisprudence.

[94] This court notes that in an even earlier case, namely, *Lim Kheak Teong v. PP* [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207, the learned President had acquitted the accused of both charges under s. 4(c) of the Prevention of Corruption Act 1961. In his judgment the learned President stated that after considering the evidence and after observing the demeanour of the accused, he found the accused had succeeded in giving an explanation consistent with his innocence. He accepted the explanation of the accused that it was an honest mistake. He also found the accused had raised a reasonable doubt on the prosecution's case.

[95] On appeal to the High Court the learned judge in appellate capacity found that there could not be any question of genuine mistake. The appellate judge then reviewed all the evidence in the appeal record and held that the learned President had misdirected himself on the explanation of the accused. He then substituted a conviction for the acquittal in respect of both charges.

[96] In delivering the decision of the Federal Court Hashim Yeop A Sani FJ had this to say at p. 40 concerning the burden of proof which is required to be discharged by the defence at the close of the defence case:

> The ruling of the appellate judge on the burden on the defence here would therefore seem to be in conflict with rulings already made in similar jurisdictions. We need only mention two. See *Mat v. Public Prosecutor* [1963] MLJ 263 where Suffian J (as he then was) said:
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> > The correct law for magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit.
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> Also *Nadarasa v. Public Prosecutor* [1972] 2 MLJ 47 where Abdul Hamid J (as he then was) said:
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> > To entitle an accused to an acquittal, it is sufficient if after considering the defence, he has cast a doubt on the prosecution case.

[97] Further down on the same page the learned judge said as follows:

> The burden imposed on the defence is a topic much discussed in many decided cases and has become trite law. The principles involved have been consistently followed in this country for nearly half a century and they were succinctly stated in the judgment of the Court of Appeal in *Rajoo v. Rex* [1949] MLJ 250. There the direction given by the trial Judge on the burden imposed on the two accused was that "they do not have to prove it with the same strictness, but it is for them to give a reasonable explanation." The Court of Appeal rejected this as a correct direction and held that:
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> > We say that this direction was inadequate because it failed to explain to the jury that if they thought that the appellant had given an explanation which might reasonably be true, even thought they were not convinced of its truth, that would mean that the prosecution had, upon the whole of the case, left them in a state of doubt and so had failed to discharge their burden of proving the accused's guilt. We further say that the direction was incorrect because to say that the accused do not have to prove it with the same strictness is to imply that they have to prove their case in some way which is not so strict and that the burden of proof has to some extent shifted to the accused. This is not correct. From the beginning of the case until the end the burden remains upon the prosecution to prove the guilt of the accused.

[98] In *Chan Chor Shuh v. PP* [2003] 1 CLJ 501 PS Gill JCA (as His Lordship then was) in delivering the judgment of the Court of Appeal which allowed the appellant's appeal against his conviction and sentence in respect of a drug trafficking charge held that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case.

[99] In *Periasamy Sinnappan v. PP* [1996] 3 CLJ 187, Gopal Sri Ram JCA (as His Lordship then was) delivered the judgment of the Court of Appeal which allowed the appeals of the 1st appellant against his convictions and sentences for three offences

of criminal breach of trust under s. 409 of the Penal Code and the appeal of the 2nd appellant against his convictions and sentences for three offences of abetment of the three offences by the 1st appellant under ss. 109 and 409 of the Penal Code.

[100] The learned judge held that while it was not necessary for the accused persons to convince the court of their explanation, it can only be sufficient if the explanation may reasonably be true: *Murugiah v. PP* [1940] 1 LNS 59 the court did not have to believe the defence story so long as the defence story can raise some doubt: *Mahadi v. PP* [1969] 1 LNS 103 or that the explanation was consistent with innocence; *Osman Khan v. PP* [1948] MLJ 56.

[101] It is clear from the cases cited above which were relied upon by the appellant's learned counsel in support of the appellant's appeal against his conviction and sentence that in the instant appeal it is sufficient for the accused in his defence to cast a doubt on the prosecution case in order to entitle him to an acquittal at the conclusion of the trial. He can discharge that burden by giving an explanation which is consistent with his innocence. He has no burden to prove his innocence. He has no burden to cast a doubt on a balance of probabilities.

[102] Therefore, it is settled law that at the close of the defence case it is absolutely essential for the learned trial judge to determine the credibility of not only the sole witness for the defence but also the credibility of the prosecution witnesses including its key witness who is none other than the complainant and to ask itself the following questions:

(1) Whether he believes the appellant and if so to acquit and discharge the appellant; and

(2) If he does not accept or believe the appellant's explanation he must ask himself whether the appellant's explanation has cast a reasonable doubt on the prosecution case (see *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311) because the learned trial judge must consider whether the appellant's explanation might reasonably be true even though he was not convinced of its truth in which case it

would mean that the prosecution had, upon the whole case, left him in a state of doubt and so the prosecution had failed to discharge its burden of proving the appellant's guilt beyond reasonable doubt (see *Rajoo v. Rex* [1949] 1 LNS 70);

[103] This court was of the view that in the instant appeal the learned trial judge erred when he admitted the taped recording of the alleged phone conversation between the complainant and the appellant and the transcript of it. The reason is that the alleged voices of the complainant and the appellant were not identified by the complainant before the learned trial judge and the defence was not given an opportunity to cross-examine the complainant on the accuracy, authenticity and veracity of the contents of the taped recording and the purported meaning of the words assigned to them by the prosecution.

[104] The learned trial judge also seriously misdirected himself when he required the appellant to prove his innocence by raising a reasonable doubt based on a balance of probabilities which militates against the elementary principles of criminal jurisprudence.

[105] This court is satisfied that had the learned trial judge not made the serious misdirection he would have found as follows:

(1) In view of the serious discrepancies and inconsistencies in the evidence of the complainant, he was not an honest, or credible or reliable witness;

(2) He also had an axe to grind against the appellant for having issued two summonses in respect of his unlicensed hawking activities and the confiscation of his property by PW5;

(3) He had been operating his cendol and rojak stall for about two years without a license from the KLCH prior to the material time and instead of applying for a license from the KLCH he had insisted on continuing to do so and when the appellant issued the two summonses against him and PW5 seized his property there was a strong probability that he might have wanted to take his revenge against the appellant by reporting the appellant and PW5 to the ACA and in setting the trap for the appellant;

(4) PW5 had his own reasons for not telling the truth and for implicating the appellant since he was also detained and arrested by the ACA officers after the appellant was similarly detained and arrested as PW5 was also implicated by the complainant in the report (P4) which was lodged by the complainant;

(5) In view of the admission of the complainant that the RM300 which he had handed over to the appellant was for the appellant to hand over to PW5 the explanation of the appellant that he merely wished to help the complainant by handing over the RM300 to PW5 in order to settle on behalf of the complainant the notice of confiscation or notice of compound which PW5 was going to issue to the complainant and that the appellant did not solicit from the complainant a monthly bribe of RM600 in order not to harass the complainant in his unlicensed hawking of his cendol and rojak or a one-off bribe of RM300 in order not to issue a summons to the complainant although not believed by the learned trial judge might reasonably be true and was consistent with the appellant's innocence since the appellant had in fact issued two summonses to the complainant and the appellant was detained and arrested by the ACA officers before he could hand over the RM300 to PW5 who had testified that the maximum amount of the compound for the offence which was committed by the complainant was that amount although his superior officer had the discretion to reduce the amount and there was no evidence called by the prosecution in rebuttal to show that the complainant's father was in actual fact not known to the appellant;

(6) The appellant's superior officer (PW3) did not testify that the appellant did not have authority to take stern action against unlicensed hawking activities by foreigners in the Bangsar area at the material time following complaints received from the public;

(7) In fact PW3 had testified that the appellant had taken pro-active action when he issued out the two summonses against the complainant and the name of the business under which the complainant's business was registered; and

A (8) In the final analysis after considering all the evidence presented before him at the conclusion of the trial he was left in a state of doubt whether the appellant had committed the offence as per the charge and this meant that the appellant had succeeded in raising a doubt in the prosecution case and
B this also meant that the prosecution had failed to discharge its burden of proving its case as per the charge against the appellant beyond reasonable doubt at the conclusion of the trial.

C **Conclusion**

[106] In view of the reasons as set out above this court was of the view that it was unsafe to allow the conviction and sentence to remain on record against the appellant. This court allowed his appeal and set him free.
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